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IN THE

SUPREME COURT OF THE UNITED STATES

Spring Term, 1969

No. 1241

JUNIOR LEE GAMBILL,
Petitioner

vs.

UNITED STATES OF AMERICA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

William H. McElwee
John E. Hall
Attorneys for the Petitioner
906 B. Street Rear
North Wilkesboro, N.C. 28659

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, JUNIOR LEE GAMBILL, prays that a Writ of Certiorari issue to the United States Court of Appeals for the Fourth Circuit to review the judgment of that court affirming judgment of the United States District Court for the Middle District of North Carolina.

OPINION BELOW

The opinion of the Court of Appeals for the Fourth Circuit (Petitioner's Appendix I) is not reported at the present time, but will be reported in due time.

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals for the Fourth Circuit and the judgment in accordance therewith, which is sought to be reviewed by this petition, was entered on the 10th day of March, 1969. The jurisdiction of the Supreme Court of the United States is invoked pursuant to Title 28 U. S.C., Section 1254 (1).

QUESTION PRESENTED FOR REVIEW

Where a government agent is instructed by his superiors to "make a case against" the petitioner and in obedience to such instructions the government agent misrepresents his true identity to the petitioner and solicits from the petitioner the sale to him of distilled spirits, and at the time is informed by the petitioner that he has no distilled spirits, and after being so informed the government agent solicits the petitioner's aid in purchasing distilled spirits from another person, and there is no evidence that the petitioner was in the business of selling distilled spirits, was entrapment of the petitioner established as a matter of law on the Government's evidence?

STATUTES INVOLVED

The petitioner was convicted of violation of Title 26 U. S.C., Sections 5601 (a) (12), 5205 (a) (2), and 5604 (a) (1). These statutes are set forth in Petitioner's Appendix II.

STATEMENT OF THE CASE

The sole witness for the government in this prosecution of the petitioner charging him with possession, sale and removal of illicit distilled spirits was an undercover agent whose true name was Robert D. Eckard, Mr. Eckard's assignment was to leave his criminal investigative duties in the State of Tennessee to go to Wilkes County, North Carolina, for the purpose of "making a case against" the petitioner.

Pursuant to Mr. Eckard's assignment, he went to the home of the Petitioner on the 29th day of August, 1968, representing himself as a bootlegger by the name of A. M. Huffman. After talking with the petitioner for some time he stated to the petitioner that he wanted to purchase a quantity of liquor from the petitioner. The petitioner advised him that he had no liquor. After further conversation Mr. Eckard asked the petitioner if he could help him get some liquor. After this, petitioner went to a country store near his residence with the officer and pointed out a man in the country store to the officer as a person from whom he could purchase some whiskey. The person who was pointed out to the officer was one Lester Bauguess. The officer made arrangements with Bauguess for the purchase from Bauguess of a quantity of of liquor. No arrangements for the purchase were made between the petitioner and the officer.

No evidence was introduced in the trial of this action to the effect that the petitioner was a dealer in liquor or that the petitioner had a record therefor. It was only after petitioner had been found guilty and the court heard evidence with regard to punishment that the government introduced evidence that the petitioner had a conviction in 1960 for the possession of non-tax-paid liquor and a 1956 conviction for the manufacture of liquor.

FEDERAL JURISDICTION

This was a criminal proceeding instituted by the United States of America upon an indictment charging the petitioner with violation of criminal statutes under the Internal Revenue Code of 1954, Title 26, U.S.C. Sections 5601 (a) (12), 5205 (a) (2), and 5604 (a) (1). The alleged violation of these statutes was the basis for federal jurisdiction in this case.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

(1) The decision of the Court of Appeals for the Fourth Circuit in this case is in conflict with the following applicable decisions of the Supreme Court of the United States.

(a) Sherman v. U.S., 356 U.S. 369, 78 S. Ct. 819, 2 L. Ed. 848 (1958).

(b) Sorrells v. U.S., 287 U. S. 435, 77 L. Ed. 413, 53 S. Ct. 210, 86 A.L.R. 249.

(2) The decision of the Court of Appeals for the Fourth Circuit is in conflict with the decisions of the Court of Appeals for the First and Second Circuits as follows:

(a) Sagansky v. U. S., 1 Cir., 358,_____F.2d, 195, (1956).

(b) U. S. v. Pugliese, 2 Cir., 246,_____F.2d, 861, (1965).

(c) U. S. v. Riley, 2 Cir., 363,_____F.2d. 255 (1966).

In this case in a *Per Curiam* decision, the Court of Appeals for the Fourth Circuit summarily stated:

"The evidence amply established that Gambill was guilty and that he was not entrapped."

However, the evidence is uncontradicted in this case, and it being the evidence of the Government that the Petitioner told the government's undercover agent that he had no liquor. The Petitioner contends that when the undercover agent was so advised by him that it became the duty of the undercover agent to cease and desist from further using any persuasuive tactics toward the petitioner in an effort to get him to violate the law. Notwithstanding, the agent continued to ask the Petitioner to help him get some liquor. The evidence is uncontradicted that the Petitioner in fact had no liquor and that it was

only after he advised the undercover agent that he had no liquor that the undercover agent continued to ask him to help him find some liquor, or to help him find someone who would sell him some liquor.

The Court of Appeals for the Second Circuit in the case of U. S. v. Riley, supra, follows the announcement of Judge L. Hand as is set forth in U. S. v. Sherman, 200 F. 2d, 880, that the defense of entrapment presents two issues:

"(1) did the agent induce the accused to commit the offense charged in the indictment; (2) if so, was the accused ready and willing without persuasion and was he awaiting any propitious opportunity to commit the offense. On the first question the accused has the burden; on the second the prosecution has it."

The first question goes simply to the government's initiation of the crime and not to the degree of pressure exerted.

In the case at issue the Government Agent *did* initiate the acts of Petitioner and, therefore, by the government's own evidence the first issue must of necessity be answered, "yes". On the second issue the government's own evidence shows that the Petitioner advised the Agent that he in fact had no liquor and the evidence further points unerringly to the fact that he did not have any liquor. For what the Petitioner did in the case at bar was only to point out to the agent a person whom he thought would sell him some liquor. There is no evidence in the case at bar that the petitioner was a dealer in liquor or that he had recent convictions therefor. It was only after the court, without a jury, convicted the petitioner that the government introduced evidence on the question of punishment that the petitioner had a conviction in 1960 for possession of liquor and in 1956 for the manufacture thereof.

In the case of *Sherman v. U.S., supra,* the Supreme Court held that where the uncontradicted evidence of the

Government establishes entrapment that the Court should dismiss the action without the submission of the case to the jury. In that case Sherman had two prior convictions for illegally possessing narcotics, the charge which was at issue in that case. The Court held that a nine year old sales conviction and a five year old possession conviction were insufficient to prove the Petitioner had a readiness to sell narcotics at the time that the undercover agent approached him. *Sherman, supra,* also held,

> "Entrapment occurs only when the criminal conduct was 'the product of creative activity' of law enforcement officials."

The Petitioner in this case strongly contends that whatever he did for the Government Agent was done at a time when he had already advised the officer that he had no liquor and that he was attempting to help the officer in pointing out to him another person who had some liquor to sell to him.

The Petitioner strongly urges upon the Court to grant the Writ petitioned for and to reexamine the defense of entrapment as was suggested by Mr. Justice Frankfurter in the concurring opinion in the Sherman case, supra. Mr. Justice Frankfurter was joined by Mr. Justice Douglas, Mr. Justice Harlan and Mr. Justice Brennan in urging upon the Supreme Court to reexamine the defense of entrapment in order "to achieve clarity of thought, because confused and inadequate analysis is to apt gradually to lead to a course of decisions that diverges from the true ends to be pursued."

The Petitioner would urge upon the Court in the case at bar to examine the factual situation in light of the statement of the Agent Eckard who candidly admitted in the trial of this cause that he was sent to Wilkes County, North Carolina, by his superiors for the principal purpose of making a case against the petitioner. That statement should be sufficient to put the Court and all concerned persons on notice that the

agent, Eckard, would do everything in his power to carry out his assignment, and that utmost in the mind of Eckard was to persuade the Petitioner to do something in his dealings with him that would be sufficient to prosecute him for the violation of some federal law. The evidence of Eckard should be examined also in light of the fact that Eckard admitted that the petitioner told him that he had no liquor and the facts bear out this statement as, in fact, the Agent Eckard purchased liquor from Lester Bauguess who was pointed out to the agent as being a man from whom he could purchase some liquor.

The Petitioner very strongly urges upon the Court to grant the Writ and to examine the facts in this case in light of *Sherman v. U.S., supra; Riley v. U.S., supra; Sagansky v. U.S., supra, and U.S. v. Pugliese, supra,* and also to examine anew the defense of entrapment in order that the lower courts may have a guideline by which to follow in cases where the Government Agent initiates the crime.

Respectfully submitted,

William H. McElwee
John E. Hall
Attorneys for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 12,959

UNITED STATES OF AMERICA, Appellee.

versus

JUNIOR LEE GAMBILL, Appellant.

Appeal from the United States District Court for the Middle District of North Carolina, at Wilkesboro. Eugene A. Gordon, District Judge.

(Argued March 4, 1969. Decided March 10, 1969).

Before HAYNSWORTH, Chief Judge, CRAVEN and BUTZNER, Circuit Judges.

John E. Hall (McElwee & Hall on brief) for appellant; H. Marshall Simpson, Assistant U.S. Attorney (William H. Murdock, United States Attorney, on brief) for appellee.

PER CURIAM:

Junior Lee Gambill appeals his conviction for the removal, possession, and sale of untaxed whiskey. 26 U.S.C. §§ 5601 (a) (12), 5205 (a) (2), and 5604 (a) (1). The evidence amply established that Gambill was guilty and that he was not entrapped. The conviction is affirmed.

PETITIONER'S APPENDIX II

STATUTES INVOLVED

TITLE 26, U.S.C., Section 5601 (a) (12):

5601. Criminal penalties

(a) Offenses. - Any person who - . . . .

(12) Unlawful removal or concealment of distilled spirits. -- removes, other than as authorized by law, any distilled spirits on which the tax has not been paid or determined, from the place of manufacture or storage, or from any instrument or transportation, or conceals spirits so removed; or . . . . shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, for each such offense.

TITLE 26, U.S.C., Section 5205 (a) (2):

5205. Stamps.

(a) Stamps for containers of distilled spirits. -- . . .

(2) Containers of other distilled spirits. -- No person shall transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container thereof is stamped by a stamp evidencing the determination of the tax or indicating compliance with the provisions of this chapter. . . . .

TITLE 26, U.S.C., Section 5604 (a) (1):

5604. Penalties relating to stamps, marks, brands, and containers.

(a) General. -- Any person who shall --

(1) transport, possess, buy, sell, or transfer any distilled spirits, required to be stamped under the provisions of section 5205 (a) (2), unless the immediate container thereof has affixed thereto a stamp as required by such section; or . . . . shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, for each such offense.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1241

JUNIOR LEE GAMBILL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH COURT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the court of appeals (Pet. App. I) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 1969. The petition for a writ of certiorari was filed on April 9, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence established entrapment.

STATEMENT

After a jury-waived trial in the United States District Court for the Middle District of North Carolina, petitioner, who was tried with co-defendants Bray and Bauguess, was convicted on two counts charging him with the removal, concealment, possession and sale of nontaxpaid whiskey (26 U.S.C. 5601(a)(12), 5205(a)(2), and 5604(a)(1)). He was sentenced to concurrent prison terms of three years, subject to the parole eligibility provisions of 18 U.S.C. 4208(a)(2). The court of appeals affirmed *per curiam* (Pet. App. I).

The government's only witness was Alcohol and Tax Tobacco agent Eckard, who testified that he was transferred by his superiors from Tennessee to the Middle District of North Carolina for the purpose of trying to make a case against petitioner and Bray by purchasing nontaxpaid whiskey from them under circumstances which would not violate the rules with respect to entrapment (Tr. 59-60, 78-79).[1]

Prior to meeting petitioner, Eckard had made two purchases of nontaxpaid whiskey from Bray, to whom he had been introduced by an informant named Benny. On August 29, 1968, Eckard, using the name Huffman, introduced himself to petitioner at the latter's home. Eckard told petitioner that he had been

[1] "Tr." refers to the transcript of proceedings at trial, a copy of which is on file with the Clerk of this Court.

buying whiskey from Bray but would like to buy it from someone else at a lower price (Tr. 35-36, 72-73). He said he had been informed that petitioner had whiskey to sell and offered to buy some. Petitioner said he did not have any whiskey (Tr. 40, 73-74). Petitioner then left Eckard and went to Colbert's store where his truck was parked. Upon returning, petitioner questioned Eckard about Benny.

Shortly thereafter the two men went to Colbert's store. Eckard asked petitioner if he could "help" him and petitioner replied "yes" (Tr. 41). Petitioner went outside to a car parked in the store parking lot. He returned in a few minutes, and motioned to Eckard to follow him (Tr. 41-42). The two men walked to petitioner's truck and petitioner said: "[T]here's a fellow in the bathroom that can help you" (Tr. 42). As they walked toward the bathroom Bauguess emerged and petitioner, pointing to Bauguess, said "This man will handle you" *(ibid.)*. Petitioner then walked away. In a conversation with Bauguess, Eckard agreed to buy twenty cases of whiskey at $20 per case (Tr. 43). When Bauguess departed to get the whiskey, Eckard went into the store and asked petitioner if he could buy more whiskey. Petitioner said: "Well, I don't like to sell it in these small lots. * * * I like to fool with hundred-case lots" (Tr. 44). He told Eckard that "$20.00 is the bottom price" (Tr. 54). Bauguess then returned with the whiskey. Eckard inquired of petitioner whether he should pay him or Bauguess. Petitioner indicated it would be "all right" to pay Bauguess (Tr. 46-47). The transaction was then completed.

On September 7, 1968, Eckard went back to petitioner's home and offered to buy more whiskey. Petitioner said that he had no whiskey and indicated that "that which I sold you last time was some extra that I had" (Tr. 49, 52, 55).

ARGUMENT

Petitioner contends that the evidence established entrapment because Eckard persisted in seeking to buy whiskey from him after he had first told Eckard that he had no whiskey to sell. However, the trial judge could properly find that petitioner was predisposed to sell illicit liquor and demurred at first only because he had not yet decided whether Eckard, a stranger, was a safe person with whom to deal.[2] Although Eckard took the initiative in asking to purchase whiskey from petitioner, it is clear that he did no more than provide petitioner with the opportunity to engage in the illegal activity. See *Sorrells* v. *United States*, 287 U.S. 435; *Sherman* v. *United States*, 356 U.S. 369; *Masciale* v. *United States*, 356 U.S. 386; *Lopez* v. *United States*, 373 U.S. 427, 434.

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[2] Petitioner left Eckard alone at his home after stating that he had no whiskey and went to Colbert's store. When he came back, he asked Eckard about Benny, the government informant, prior to agreeing to "help" Eckard buy whiskey. Later, when Eckard and petitioner were talking in the store, petitioner evinced some apprehension that Eckard "could pop a badge on me and be a Federal Agent." Eckard assured petitioner that he was not and petitioner said "I hope not" (Tr. 46).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROGER A. PAULEY,
Attorneys.

APRIL 1969.

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